No. 80-2142

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANGELO C. PAPPALARDO, ET AL.,

Petitioners,

-against-

LEO M. SHORE,

Respondent,

-against-

PARKLANE HOSIERY COMPANY, INC., and

HERBERT N. SOMEKH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below correctly hold that there was no abuse of discretion by the District Court Judge in approving a proposed settlement of a class action after a full hearing at which the petitioners, representing a small minority of the class and whose expressed purpose in objecting to the approval of the settlement was to keep litigational pressure on the defendants to settle an independent action brought by the petitioners, were afforded every opportunity to raise any objections?

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- against -

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Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District Court and the Second Circuit (App. A and D, respectively, of the Petition, p. A-1 and A-94[1]) are unreported.

JURISDICTIONAL STATEMENT

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. §1254(1); Section 10(b) of the Securities Exchange

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[1] Citations herein to pages of appendices are to each appendix of the Petition and will appear as follows: "App. _____, p. _____")

Act of 1934, as amended (15 U.S.C. §78j[b]; and Rule 23(e) of the Federal Rules of Civil Procedure, each of which is set forth in Appendix E to the Petition. No constitutional provisions are involved.

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the affirmance by the Second Circuit of a decision by the United States District Court for the Southern District of New York entered August 1, 1980, approving the proposed settlement of this class action as fair, reasonable, and adequate. See App. A, pp. A-1 -- A-70. The preceding history of this case is set forth in the decision approving the settlement at App. 4, pp. A-4A -- A-15.

The petitioners admit that there are no constitutional issues involved in this petition. There is no conflict between the decisions below and decisions in any other Circuit. The only issue present is whether the District Court abused its discretion in approving the settlement. The Court of Appeals held that it did not.

This petition is another in a long series of delaying tactics by the petitioners to seek to prevent resolution of this litigation. The action arose as a result of a "going private" merger of Parklane Hosiery Co., Inc. ("Parklane") into New PLHC Corp. ("the merger"). The petitioners are a group of shareholders who, subsequent to the

filing of the instant action, commenced a state appraisal proceeding.

Following the instant action, the Securities Exchange Commission ("SEC") brought an enforcement proceeding ("SEC Action") against Parklane and Herbert N. Somekh ("Somekh"). In the SEC Action, the trial court found (affirmed on appeal) that there were misstatements and omissions in the merger proxy statement. After the decision in the trial court in the SEC Action, plaintiff moved for partial summary judgment on the basis of collateral estoppel alleging that since those misstatements and omissions had been litigated in the SEC Action, the defendants were collaterally estopped from relitigating them in the class action. The plaintiff

lost in the District Court and the Second Circuit unanimously reversed, 565 F.2d 815 (2d Cir. 1977). This Court granted certiorari and affirmed the decision of the Second Circuit, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979).

Subsequent to the decision of the Second Circuit reversing the denial of partial summary judgment, plaintiff and defendants entered into negotiations for the settlement of this class action. Although the petitioners had not opted out of the class and would, therefore, be bound by any judgment, in order not to adversely affect their interests in their state appraisal proceeding, class counsel negotiated a settlement which permitted them to opt out of

the class and continue their appraisal proceeding and, if they so desired, to continue this action against the defendants with their own counsel on their own behalf.[2]

Despite the complete protection of their interests, the petitioners repeatedly attempted to thwart the proposed settlement and succeeded in delaying the settlement and settlement hearing for several years. The Second Circuit, in dismissing a prior appeal brought

[2] Class counsel also negotiated an agreement with the defendants that the defendants would not seek to use the settlement as any form of res judicata against the appraisal shareholders.

by the petitioners of, inter alia, a denial of intervention as of right and a stay of this action, observed that the petitioners' sole motive was delay:

> It is quite obvious that appellants' motive in moving to intervene was to delay the approval hearing until the four-year-old state appraisal proceeding was concluded. The district court's order was intended to avoid this delay and at the same time preserve all of appellants' rights. Shore v. Parklane Hosiery Co., Inc., 606 F.2d 354, 358 (2d Cir. 1979).[3]

3 Oblivious to the Second Circuit's admonition, the objectors again sought to delay the hearing on the settlement by again moving to intervene for the purpose of again raising their objections to the settlement and sought, inter alia, to enjoin the hearing on the proposed settlement. The requests were denied.

After holding a hearing, and reviewing the massive papers filed by the petitioners, defendants, and class counsel, the trial court found that the settlement fell within the "zone of reasonablness" and approved it. (App. A, pp. A-44 -- A-45).

The settlement provides for, inter alia, a fund of $205,000.00, plus certain minor amounts and interest which calculated to July 1, 1981 would increase the fund to about $285,000.[4] During the negotiations of the settlement and the drafting of the stipulation of settlement, counsel for petitioners

4 Due to the two year delay caused by the petitioners in the hearing on the proposed settlement, class counsel negotiated interest on the settlement fund, retroactive for two years.

knew of and were involved in both the negotiations and the drafting. The objections they made to the settlement and which were overruled in the trial court were objections to terms of the settlement which they had implicitly accepted. In fact, petitioners submitted their own draft of the stipulation of settlement which contained the same monetary terms before addition of interest.

Following the signing of the stipulation of settlement, petitioners for the first time claimed to have many objections to it. Perhaps the best explanation for the otherwise inexplicable actions of the petitioners was revealed in a letter to class counsel from Mr. Wisehart, counsel

for the petitioners, dated April 19, 1978. Mr. Wisehart stated:

> . . . [the settlement] removes a large part of the litigational pressure [to settle the appraisal proceeding with Messrs. Wisehart and Cuccia] from the defendants which your excellent firm is able to bring to the case. (Bracketed language added for explanation)

The petitioners have never attempted to explain this admission.

Parenthetically, petitioners incorrectly state at page 8 of their petition that the proposed settlement was arrived at prior to the granting of the petition for a writ of certiorari in Parklane Hosiery Co., Inc. v. Shore, supra, and that class counsel failed to notify this Court of the pendency of a settlement proceeding.

Class counsel and defendants'

counsel jointly spoke with the Clerk of this Court, advised him of the proposed settlement and were told that the proposed settlement did not affect the status or the scheduling of the appeal to this Court.

Also, this Court had noted in a recent decision that a proposed class action settlement does not moot an appeal to this Court. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

ARGUMENT

POINT I

The District Court Did Not Abuse Its Discretion In Approving The Proposed Settlement

The basic argument of the petitioners in support of the granting of the writ is that the settlement

is inadequate. The determination of the adequacy of the settlement is vested in the trial court; and the Second Circuit, after review of the record in this case, determined that the District Court did not abuse its discretion in approving the settlement. App. D, pp. A-94 -- A-96. This discretionary matter neither merits nor qualifies for the extraordinary relief demanded by petitioners. See Sup. Ct. R. 17.

Furthermore, the trial court carefully considered each of the requirements which must be satisfied to support the settlement of a class action; it held a hearing at which all counsel were fully heard and permitted the introduction of

all material which the petitioners wished to submit as well as full oral argument; it carefully reviewed the substantial record; and it determined that it was in the best interests of the class that the settlement be approved. Petitioners have not shown that the Court abused its discretion in so doing. In re Traffic Executive Association - Eastern Railroads, 627 F.2d 631 (2d Cir. 1980).

The Supreme Court, in its affirmance of the grant of partial summary judgment to the class in Parklane Hosiery Co., Inc. v. Shore, supra, precluded relitigation of the issue of whether the proxy statement contained misrepresentations and omissions. However, the Supreme

Court specifically recognized that the class would nevertheless have to prove that they were injured thereby and would further have to prove their damages. Id. 649n, citing Mills v. Electro-Auto Lite Co., 396 U.S. 375 (1970). The trial court weighed these risks of continued litigation - risks of causal relationship between the proxy violations and the injury to the class, uncertainties of jury trials, and extensive disputed testimony as to damages and valuation[5] - and determined that the settlement was proper.

5 The widely divergent values placed upon the shares of Parklane by reputable experts only emphasized the need for compromise and the support of the settlement least the matter become a classic "battle of appraisal experts". Rubenstein v. Republic National Life Insurance Company, 74 F.R.D. 337, 345

The course of the appraisal proceeding prosecuted by petitioners provides strong support for the settlement of the class action. After over sixty hearing days, more than a hundred requests for adjournments, and thousands of pages of testimony and colloquy, the appraiser rendered a report valuing the shares at only $4.38. Class members who filed proof of claim will receive in excess of $4.66 a share less or pro rata share of attorneys fees.

(N.D. Tex. 1976), aff'd 559 F.2d 426, rehearing denied, 564 F.2d 97 (5th Cir. 1977). The trial court noted that the battle sought by the petitioners

> . . . would entirely frustrate the policy favoring settlement, and would contravene the Second Circuit's direction that the Court not turn the settlement hearing into the very trial which the settlement is intended to avoid. (App. A, p. A-39).

The question raised and decided in the trial court was whether the hard-fought compromises embodied in the proposed settlement are within a range which reasonable and experienced attorneys could accept, considering all of the relevant risks and factors of this litigation. The trial court, after extensive briefing, close observation of and familiarity with the case, and a hearing at which petitioners were given opportunity to present evidence and arguments, determined that in light of all relevant factors the settlement was within the zone of reasonableness and should be approved. There is nothing in the petition which shows that the approval was an abuse of discretion or should merit the consideration by this

Court.

Similarly, the arguments proffered by petitioners relying upon (a) this Court's previous decision in this case and (b) Diamond v. Oreamuno, 24 N.Y.2d 494 (1969) and Affiliated Ute Citizens v. United States, 406 U.S. 28 (1972) do not demonstrate any basis for the exercise of this Court's jurisdiction.

The suggestion that the class counsel did not adequately assess the holding of this Court in Parklane Hosiery v. Shore, supra is simply not correct. First, at the time of the signing of the stipulation of settlement, the decision of the Second Circuit in favor of the class was not only taken into account, but precipitated the

settlement. The trial court weighed the decision of this Court affirming the Second Circuit as a factor in determining whether to approve the settlement, see App. A, pp. A-49 -- A-52, and the petition argues only that the Court didn't weigh it enough.

The Petitioners also attempt to invoke the jurisdiction of this Court with the contention that the ruling in Diamond v. Oreamuno, supra, which they claim was transmitted into federal law by Affiliated Ute, supra (Petition at p. 15), supports a theory of greater potential damages for the class in the instant case. The claim made by petitioners is that the former minority shareholders of Parklane are entitled to trace the proceeds from the merger and

the profits, if any, therefrom made by Somekh to sometime in the future, after the class members had ceased to be shareholders of Parklane. Were this case to go to trial, the class might well contend that it was entitled to such a recovery. However, class counsel also considered that there were formidable obstacles which might limit the use of Diamond here, including the unclear extension of the Diamond derivative remedy to a class action, questions of causation, and the issue of whether the damages sought were suffered in connection with the purchase and sale of securities. When petitioners made the argument to the district court, it assessed the impact of Diamond on this case as "a most doubtful proposition." (App. A, p.

A-30). Even if the Diamond theory were applied to this case there is no evidence that larger damages would result; petitioners introduced no evidence that Somekh made a profit.

POINT II

The Decision Of The District Court Does Not Conflict With The Decision Of The Seventh Circuit in In re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106, (7th Cir.)., cert. denied, 444 U.S. 870 (1979).

Petitioners strain to create the appearance of a conflict between the opinion below and the opinion of the Seventh Circuit in the General Motors Corporation Engine Interchange Litigation, supra. Petitioners also embrace the Manual for Complex Litigation ("Manual") partly employed by

the Seventh Circuit in the General Motors case as supporting the grant of the writ here.

Reduced to its essentials, petitioners' argument is not that the opinions below "conflict with the decision of another federal court of appeals on the same matter," Sup. Ct. R. 17, but that the trial court abused its discretion in not ordering a preliminary hearing prior to the full hearing on the settlement. This argument does not merit the granting of certiorari.

In addition, the references to General Motors and its citations to the Manual relied upon by petitioners in support of their argument are misplaced.

In General Motors, the Court

was critical of the settlement negotiations because various class counsel appointed by the Court were not included in the settlement negotiations. General Motors involved a series of classes and subclasses. The court there addressed its criticisms to the actions of one class counsel in negotiating a settlement without the other class counsel. In the instant action, Messrs. Wisehart and Cuccia were never counsel for the class. They are counsel for certain members of the class who have opted to seek appraisal of their shares and have taken a position different from and adverse to the bulk of the class. App. A, p. A-65 -- A-68 (distinguishing General Motors and the other cases

relied upon by petitioners).

Even under the General Motors case, petitioners had no right to attend settlement negotiations. Although petitioners had no right to participate, respondent kept petitioners advised of the negotiations and permitted petitioners to take an active role in many of the settlement discussions (contrary to the representations contained in the petition). Counsel for the petitioners (a) attended meetings with attorneys for the class and the defendants at which the terms of a stipulation of settlement were discussed and reviewed and (b) prepared their own drafts of proposed stipulations of settlement. These drafts prepared by the petitioners contained (but

for the interest) the identical settlement fund to that of which they now complain.

Similarly, petitioners' suggestion that the writ be granted because of the alleged failure of the District Court to follow the procedures outlined in the Manual does not support jurisdiction here. See Sup. Ct. R. 17. First, we note that the petitioners raised precisely this point in the second appeal to the Second Circuit where the petitioners sought to stay the sending of notice of the proposed settlement to the class and to stay the hearing on the proposed settlement. The court did not adopt their suggestion. Petitioners now claim again that the District Court abused its discretion

in failing to apply the Manual. As noted at 15 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3868, the list of types of cases to which the procedure of the Manual applies:

> "[I]s extremely inclusive; certainly, not every case that falls within one of the mentioned categories will result in the kind of protracted litigation that justifies using the elaborate procedures described in the Manual. (Emphasis added)

This case does not require the application of the Manual. It is not complex as that term is understood in the Manual. None of the procedures outlined in the Manual has ever been followed in this action as neither counsel for the class, defendants, or any of the three District

Court judges or two Magistrates to whom this action has been assigned ever deemed those optional procedures desireable.

POINT III

The Petitioners Are Acting As "Spoilers" For The Class

Respondent submits that the petitioners are not motivated by the interests of the class. They have delayed notification of the class of the proposed settlement, delayed the hearing on the proposed settlement, and delayed payment of monies to members of the class.

The appellants are acting only as "spoilers" for the class. See, e.g., Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1179 (9th Cir.

1977) (appellants' personal objections to a class action settlement could have been solved by opting out of the class[6]). See also App. A, pp. A-45 -- A-46.

[6] Respondent here has negotiated the unprecedented right for the petitioners to not be bound by the class settlement if they so desire, despite the fact that they had previously failed to opt out of the class when the original notice to the class had been sent. Respondent further negotiated the right for the petitioners to continue this action, in addition to their appraisal proceeding, if they so desired, and negotiated the agreement of the defendants that the defendants would not seek to use the settlement as any bar, as collateral estoppel, or as any res judicata effect against the petitioners to hinder the appraisal proceeding. Thus, each of the purported objections were solved - except, the real one - that the settlement "removed the ligitational pressure on the defendants to settle the appraisal proceeding."

The charges made by the petitioners regarding the settlement and its negotiations in support of their request for the writ were weighed and dismissed by the trial court:

> I also reject the appraisal group's contention that class counsel conducted the settlement negotiations in an improper manner, and committed other improprieties, so as to taint the settlement.[6] [footnote distinguishing the case relied upon by the objectors]. (App. A, p. A-22)

The Court's instruction in the settlement of a securities class and derivative action in Seiden v. Nicholson, 72 F.R.D. 201, 205-206 (N.D. Ill. 1976), is peculiarly appropriate to the instant action:

> In short, it is clear from documents prepared by Silverstein and McGillicuddy that they are embroiled with CNA in a series of conflicts

> for large stakes. Under these circumstances, one must view with skepticism the claim of Silverstein and McGillicuddy that they are challenging the instant settlement because it is unfair to CNA. Objections to class action and derivative settlements cannot be used to gain leverage in other disputes. Objectors cannot enter a proceeding purporting to protect a corporation or a class and instead use the proceeding for their own ulterior purposes that could harm the interests of the class and corporation by delay, expense, confusion, and the loss of a favorable settlement. (Emphasis added).

CONCLUSION

The District Court carefully reviewed the extensive evidence submitted to it and found the settlement was reasonable. Petitioners have failed to show that the District Court's approval of the settlement

was an abuse of discretion, and have failed to demonstrate anything which warrants this Court's granting of the writ.

The petition for a writ of certiorari should be denied.

DATED: New York, New York
July , 1981

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